

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CORE WIRELESS LICENSING S.A.R.L.		DOCKET 6:12CV100
VS.		AUGUST 1, 2014
		9:32 A.M.
APPLE, INC.		TYLER, TEXAS

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REPORTER'S TRANSCRIPT OF HEARING RE BENCH TRIAL

BEFORE THE HONORABLE JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

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1 (OPEN COURT, ALL PARTIES PRESENT.)

2 THE COURT: All right. Ms. Morris, you may
3 call the case.

4 DEPUTY CLERK: The court calls Case
5 Number 6:12cv100, *Core Wireless versus Apple*.

6 THE COURT: Announcements.

7 MR. BUNSOW: Good morning, your Honor. Wesley
8 Hill and Henry Bunsow on behalf of Plaintiff Core
9 Wireless.

10 THE COURT: Good morning.

11 UNIDENTIFIED SPEAKER: Good morning, your
12 Honor.

13 MR. ALBRITTON: Good morning, your Honor.

14 Eric Albritton and Joe Mueller for Apple.
15 We're ready. Along with us is (indiscernible), in-house
16 counsel for Apple.

17 THE COURT: All right. Thank you.

18 UNIDENTIFIED SPEAKER: Good morning, your
19 Honor.

20 THE COURT: Good morning.

21 All right. Well, we're here -- I wanted to --
22 in light of -- as the course of this case has developed,
23 at various times I've discussed with counsel issues
24 related to these RAND -- how the RAND interaction between
25 the parties occurred and what the parties' positions are

1 with regard to that and RAND rates, RAND royalties.

2 We've discussed that at various times during the course
3 of the litigation.

4 It was brought into more focus to some degree,
5 although perhaps less focused perhaps in some ways, by
6 the letter briefing procedure. There were a number of
7 letter briefs devoted to what the court should do with
8 this issue or that issue related to contractual
9 obligations and RAND rates and how that all -- all that
10 interaction should take place as far as the court making
11 determinations.

12 I determined that I was not going to make
13 those -- determine those issues as a matter of summary
14 judgment, leading to a question that I had and that I
15 wanted to explore with the parties. We've discussed at
16 various times how these issues should be resolved, what a
17 jury would resolve, what perhaps the court's role would
18 be, discussed that at various times and, as I say,
19 brought into greater focus in some respects by the letter
20 briefing procedure.

21 I wanted to go ahead and discuss, before this
22 case got too far down the road to trial, the possibility
23 of the court making some determinations, appropriately of
24 course, not taking away anything from the jury but making
25 appropriate determinations which, A, might help the

1 parties get to a resolution in this matter; B, might make
2 the trial more streamlined and straightforward for the
3 parties and for the jury.

4 Obviously what I've received from the parties
5 preceding today is one party taking the position, Core,
6 that a bench trial would be appropriate in certain
7 respects, Apple taking the position that it would not be.
8 So, we don't have agreement on it. I understand that. I
9 think part of my questions today will be what do I do, if
10 anything, with that disagreement.

11 So, I wanted to ask some questions; and then I
12 may have some follow-up orders on things I'd like the
13 parties to submit to me for my review as this case gets
14 closer to trial.

15 So, I don't need any sort of -- I've read your
16 briefs. I don't need anything along those lines, but I'm
17 going to ask some questions. And if any of the parties
18 would like to say anything before we get started -- I
19 don't know. Any change of position, anything like that
20 before I delve into questions, Mr. Bunsow?

21 MR. BUNSOW: No, your Honor. I just agree
22 with you. I think the thinking on this has been evolving
23 not only in this case but in a lot of other cases.

24 THE COURT: Right.

25 MR. BUNSOW: This issue is present in a lot of

1 other cases.

2 THE COURT: Right.

3 MR. BUNSOW: And what we submitted to you
4 Sunday night is our latest. Thank you.

5 THE COURT: All right. Thank you.

6 Mr. Mueller, anything you'd like to say?

7 MR. MUELLER: Not right now, your Honor.

8 THE COURT: All right. Well, I guess let me
9 ask Apple. Mr. Mueller, why don't you go ahead and go to
10 the podium and just let me ask you a few questions.

11 And, again, this is just an exploration of --
12 I've explored this several times with you, I know. I
13 don't want to beat a dead horse; but it is a, I think,
14 evolving process as far as how the courts handle this,
15 what's appropriate, what's not. And, so, this is just
16 kind of, I think, educating for me and for probably you
17 guys as you look at these things in this case and perhaps
18 other cases.

19 So, let me ask this, Mr. Mueller. I
20 understand from the brief you submitted Apple's position
21 is that Apple does not believe that what I wanted to
22 explore today -- that is, the possibility of a bench
23 trial on certain, just as kind of an umbrella catchall
24 phrase, RAND rates, RAND issues, perhaps contractual
25 obligations, that type of thing, would not be

1 appropriate.

2 Now, my question to you, Mr. Mueller, I guess,
3 first has to do with the concept of could the court give
4 you -- what becomes apparent to me in reviewing these
5 materials that the parties continue to submit is this is
6 very important. I don't want to say -- it's
7 determinative in some respects, I think. Maybe not. But
8 I'll say the importance of it that keeps being advanced
9 and argued and put front and center makes me think that
10 this is very important.

11 So, would some determinations from the court
12 be helpful in, A, helping you and Core settle the matter?
13 I mean, it's possible that this could turn out very
14 favorable to Apple. You know, I know there's always the
15 risk it could go south. It could go your way. But would
16 a non -- not taking anything away that should be resolved
17 by the jury, but whatever the court can resolve -- and
18 maybe there's nothing the court can resolve. Maybe
19 that's just the way it is. And this is an evolving
20 situation in the courts, and maybe there is nothing the
21 court could really do and it all should just go to the
22 jury. And that's fine.

23 But I guess my question is: Would there be a
24 possible favorability to Apple, and also would it help
25 possibly Apple resolve the matter without the need of a

1 full-blown infringement-validity-damage jury trial?

2 MR. MUELLER: So, if I could take that in
3 parts, your Honor. Our major position is advanced in the
4 briefing -- and we believe it's the right answer -- is
5 that a pre-jury trial bench trial wouldn't advance the
6 merits and actually could lead to some inefficiencies,
7 and let me explain why.

8 You're a hundred percent right that the FRAND
9 issues in this case are important issues to the parties.
10 They're important issues beyond this case, and there's a
11 lot happening in the law. So, there's no question these
12 are important issues. And there is also an important
13 role for the court to play, and I'll get to that in a few
14 moments.

15 But I would say equally important in this case
16 are the basic patent merits. And even though there are
17 FRAND issues in this case and those issues are
18 significant, the starting point for this case are the
19 patent allegations made by Core Wireless and our defenses
20 to those allegations; and this is not a case in which we
21 are -- you know, the parties are inevitably going to move
22 towards rate setting. You know, we feel very strongly
23 that their allegations are wrong and that we're going to
24 prevail on liability. And if we do, this is a moot
25 point. All of these FRAND questions, the rate-setting

1 issues, you name it, will not be live issues if, as we
2 hope and expect, we prevail on the merits.

3 So, in that sense this is like every other
4 patent case that your Honor has. The merits are
5 critical, and we think that we need to proceed towards
6 those merits on the current schedule and try the case.

7 Depending on what happens in that merits
8 phase, we think there could be some other proceedings --
9 and I'm happy to talk to you about our thoughts on ways
10 those could be framed -- that follow the merits
11 proceeding. But the merits proceeding is the threshold
12 hurdle that the parties need to clear; and if they can't
13 clear that hurdle, the case is over. And we think they
14 can't. So, that's the first thing.

15 The second thing is the role of the court.
16 There's a couple pieces to that. Before the jury trial
17 takes place -- and we hope it takes place as scheduled,
18 in January -- we've asked your Honor and we've moved for
19 *Daubert* and that will be heard and that's a very
20 important motion that we think raises some critical
21 issues for framing the case for the jury on FRAND
22 damages.

23 We will request from your Honor jury
24 instructions that reflect the law in this area, and that
25 also is going to be quite important for structuring the

1 trial for the jury. So, those are all important
2 functions that we will ask your Honor to play for that
3 jury trial in January.

4 But there's more as well. Once that jury
5 trial ends, if there were any liability -- and again, we
6 hope and expect there will not be -- there would be some
7 additional questions. One would be whether your Honor
8 thought there was no reasonable defense such that the
9 first prong of the willfulness test were met and there
10 could be some follow-on willfulness proceeding.

11 Second would be patent unenforceability. Now,
12 Core Wireless mentioned this in its briefing; and we
13 agree with them that unenforceability of a patent is an
14 issue for the court. We think the evidence on that will
15 substantially go in as part of the jury trial on the
16 technical merits. There may be some additional evidence
17 that your Honor would need to hear as part of a separate
18 follow-on proceeding that could occur immediately after
19 and wouldn't take very long at all. But much of the
20 evidence would go in as part of the patent merits trial,
21 and that would be an issue for your Honor as well.

22 So, the short of it is there are some
23 important functions for the court to play before the jury
24 trial. There are some issues the court would need to
25 decide, perhaps, after the jury trial. But our position

1 is the jury trial needs to go first, both to see if this
2 is even a live issue; and there is a second reason as
3 well, your Honor. And the second reason is the valuation
4 of the patents from a RAND perspective, issues like
5 unenforceability, willfulness for sure. All of those
6 issues will be substantially instructed for all of us by
7 the evidence that goes in at the trial, and the notion
8 that we could do some one-day proceeding this fall to set
9 a FRAND rate we don't think is practically possible.

10 There's many aspects of the FRAND rate-setting
11 process that turn entirely, or heavily, on the technical
12 evidence. So, for example, were there available
13 alternatives to the technologies that they say the
14 patents covered, a hugely important issue for determining
15 how much those patents are worth. If there were five
16 ways to do it and there's no performance benefit to the
17 one that the patents covered, that's going to mean a much
18 lower value. You know, perhaps they could show a lack of
19 non-infringing alternatives; that might go in the other
20 direction. We would have to see. The point is the
21 technical evidence is very important for setting a FRAND
22 rate.

23 They mentioned the *Microsoft* case, the
24 *Innovatio* cases. Those were substantial proceedings.
25 The *Microsoft* case was an over-one-week bench trial.

1 *Innovatio* was collectively like ten days worth of
2 testimony, including heavy testimony on the technical
3 issues in the case.

4 So, we're not going to be able to do a short
5 proceeding to set a FRAND rate and thereby help the jury.
6 We think the proper course is to put the technical
7 evidence in, have the jury -- if there is any liability
8 at all -- decide damages, FRAND-instructed damages. And
9 then if there's any remaining damages afterwards, that
10 technical evidence and that trial record would inform the
11 issues.

12 That's what happened in the *Ericsson* case,
13 your Honor, where the jury heard the liability issues,
14 the jury set FRAND damages; and then after that, there
15 were some follow-on proceedings.

16 But we think both from the perspective of
17 deciding whether these are even live issues at all and
18 also the perspective of having the full record necessary
19 to conduct the valuation analysis and the perspective of
20 having the jury decide the issues the jury needs to
21 decide, we go forward on the merits trial. We do it as
22 scheduled. And the only question in our view is how do
23 we structure any follow-on proceedings.

24 THE COURT: And, so, Mr. Mueller, I think I
25 know the answer to this question; but your position is

1 there is not a role or a need for the court to be
2 involved -- I understand your position -- pretrial but
3 also post trial. In other words, Apple's position is
4 that all of this should be resolved by the jury.

5 MR. MUELLER: That's basically correct, your
6 Honor, in this sense. The jury should decide the damages
7 like in any patent case. Now, they should have, we
8 believe, instructions that reflect --

9 THE COURT: Appropriately instructed, right.

10 MR. MUELLER: Appropriately instructed.

11 We think they can decide the FRAND
12 properly-instructed damages.

13 We also think the contract claims, which we
14 would suggest could be staged after the patent merits
15 trial, for reasons that I'm happy to explain -- but that
16 breach of contract is a jury claim. Any damages on those
17 claims, both on our claims or their claims, are jury
18 questions; and a properly instructed jury could decide
19 those issues as well.

20 THE COURT: All right. Well, just to wrap
21 this up, I don't think it would be the court's preference
22 to stage the infringement allegations and the breach of
23 contract allegations. I think it would be the court's
24 preference to -- if we're going to try it to the jury,
25 we're going to try it to the same jury.

1 What's your position on that?

2 MR. MUELLER: So, I'd say this on that, your
3 Honor. We could do and would suggest the most efficient
4 course would be to have that patent merits trial. If
5 there's no liability, I can't imagine how the contract
6 claims they've brought could possibly go forward at that
7 point. The gist of the claims is that Apple is not
8 negotiating in good faith for the patents-in-suit. If
9 there is no infringement or they are invalid, that claim
10 would seem to be dead. So, there's no need for the jury
11 to decide it if that's their finding.

12 If, however, they were to find liability on
13 one or more of the patents, the jury could be held over
14 to decide those contract issues in a short second stage.
15 Now, here's the reason why we think that's appropriate,
16 your Honor. There's going to be -- and you'll hear more
17 about this, I'm sure, over the next few months -- some
18 very tricky evidentiary questions on the contract claims
19 in particular; and Core Wireless alluded to some of them
20 in their briefing.

21 I take it that they intend to put in front of
22 the jury certain correspondence they've marked Rule 408.
23 And there is a dispute, I think -- or at least
24 uncertainty -- as to which of the correspondence between
25 the parties and discussions between the parties would be

1 408 protected which might be subject to a mediation
2 privilege pursuant to the court's mediation proceedings.
3 There are some very difficult issues along the
4 admissibility lines.

5 In addition, there's prejudice issues. You
6 know, we think the jury should decide liability with a
7 focus on the patent claims being applied to the accused
8 products and the prior art, period, and not have, you
9 know, tainting their view of those core merits any side
10 issues involving correspondence between the parties.
11 That's exactly what Rule 408 is intended to prevent.

12 And, so, these evidentiary questions which are
13 difficult don't need to be addressed in the patent merits
14 phase; and they may be moot entirely if we went on
15 liability. But if we didn't, we could hold the jury over
16 and do a short follow-on proceeding on any residual
17 contract claims. And, again, that's very similar to what
18 happened in the *Ericsson* case. The jury was held over
19 after the initial determination.

20 THE COURT: All right. Thank you.

21 Okay. Let me hear -- Mr. Bunsow, let me ask
22 you a couple of questions. There's obviously no
23 agreement among the parties as far as a pretrial
24 proceeding here; so, if the court does not proceed with a
25 pre-jury trial bench trial, I believe you've indicated to

1 me in earlier proceedings that your position -- and
2 perhaps it's evolved -- would be that a jury trial would
3 be appropriate on these FRAND issues that we've been
4 talking about.

5 My question, I guess, is -- as to Mr. Mueller,
6 the same thing I'm going to ask you -- is there a post
7 jury trial role/function for the court to play on these
8 FRAND issues or damage issues; or should it, if you don't
9 get a pretrial bench trial, just go to the jury? What's
10 your position on that?

11 MR. BUNSOW: So, I think what Mr. Mueller is
12 suggesting is really putting the cart before the horse in
13 this particular situation. They alluded in their filing
14 of yesterday to some comments that I made previously.
15 I've got that transcript. But if you look at it, what I
16 was talking about was the portfolio situation. We're
17 litigating eight patents in this case. Does that mean we
18 have a follow-on trial of eight more and we have a
19 follow-on trial of eight more? This was on the motion
20 whether or not to go forward with our counterclaim for a
21 portfolio license. That's what those comments were
22 directed to.

23 And our thinking is evolving on this.
24 Absolutely. But as we look at the trial, I think you
25 have to say, "Okay. What does this trial look like?"

1 Mr. Mueller wants a determination on the merits and a
2 January trial. I agree. Let's get a determination on
3 the merits of the patent issues in a manageable trial in
4 January.

5 The question is what is the potential impact
6 of, in particular, the ETSI contract issue; so, let me
7 give you an example. Apple claims that, for a couple of
8 reasons, we did not comply with our ETSI obligation and,
9 therefore, the patents are unenforceable.

10 Why have a jury trial, present that evidence
11 to the jury when it's a legal determination, and then try
12 to decide that post jury trial when it's exactly the type
13 of issue that can be decided by the court in advance
14 based on the interpretation of the ETSI rules? I mean,
15 that's a legal determination. There are no factual
16 disputes about that. We did what we did when we did it.
17 No factual disputes whatsoever.

18 And the question is, for the court, under the
19 ETSI rules what's the result of that. Do we lose our
20 right to enforce the patents or not? A jury can't decide
21 that. A jury is not going to be tasked with deciding
22 what the ETSI language means. That's exactly the
23 antithesis of what jury trials are all about. So, that's
24 the first thing that we believe should be decided before
25 any jury trial and can be done by the court in a very

1 efficient way and clear that out and help make the jury
2 trial manageable.

3 The contrary -- the other side of that, of
4 course, is our claim that Apple has not complied with its
5 obligations as a member of ETSI and that that has two
6 impacts. Most dramatic for the jury trial is that it
7 does not allow Apple to claim a FRAND royalty rate
8 anymore. So, it has a direct impact on the damages
9 consideration by the jury. Is the jury going to be told
10 at trial that they're limited to a FRAND determination?
11 That's what Apple would have the court do.

12 But if we do a post-trial hearing on Apple's
13 FRAND and ETSI obligations, that will nullify the jury
14 verdict if we win and it turns out that Apple is not
15 entitled to FRAND damages.

16 So, those two issues should be decided in
17 advance of trial. They should be decided so that the
18 court can frame the issues appropriately for the jury
19 clearly.

20 We have gone on to explain why other aspects
21 of -- other issues in the case should be decided as well,
22 primarily because there are simply no disputed factual
23 issues about them. But, you know, we all agree that the
24 FRAND issues are important. Apple has pleaded that the
25 FRAND issues are determinative on liability. We have

1 pleaded that the FRAND and ETSI issues are determinative
2 on at least damages and possibly remedies, opening Apple
3 up to potential injunctive relief, which is also for the
4 court. So, it makes no sense to us to present all of
5 that in the context of what is otherwise a
6 straightforward patent infringement case when it should
7 be decided in advance by the court.

8 You can't do it afterwards because you would
9 have to reset what the jury had already done. So,
10 basically if you decide afterwards that Apple is not
11 entitled to a FRAND determination, then we're going to
12 have to have another damages trial. You'd have to set
13 aside the jury verdict and have another damages trial.

14 So, that's why we've proposed that the court
15 take these legal issues. They're very focused. I think
16 they're very manageable, and I think we could do it in
17 one day with the appropriate briefing.

18 THE COURT: Well, I understand that's your
19 position and I appreciate that and it's something to look
20 at. But what do I do with the fact that Apple doesn't
21 agree to a pretrial determination such as you're talking
22 about?

23 MR. BUNSOW: Well, two answers to that. First
24 of all, these are pure legal determinations for the
25 court; and I don't think Apple has any say in that. If

1 it's a legal determination for the court, then you can
2 scream for a jury trial all you want; you're not entitled
3 to a jury trial, constitutionally or otherwise.

4 THE COURT: Well, and that seems to be where
5 the disconnect is between the parties here; and maybe
6 that's what I need to get you to specifically brief is.

7 MR. BUNSOW: Sure. So, let's look at what the
8 jury trial would look like as Apple proposes it.

9 THE COURT: What I need to understand from
10 you, Mr. Bunsow, is you say they're legal issues. If
11 they're purely legal issues that's for the court to
12 resolve, specifically identify what those are and then
13 let me get Apple to respond to that.

14 MR. BUNSOW: Sure.

15 THE COURT: If it's as you're saying, that
16 they're not entitled to a jury trial on this, and it's as
17 you described, then perhaps I agree that a pretrial
18 determination of those issues would be appropriate such
19 that the jury can appropriately assess damages such that
20 we would not have to come back and have another jury
21 trial, depending on what the court found. So, identify
22 for me specifically what the legal issues are here and
23 let me get Apple to respond to that.

24 MR. BUNSOW: Okay. So, on Apple's claim it's
25 based on the explicit wording of the ETSI regulations.

1 Nokia and Core are both members of ETSI. They made
2 declarations, including the patents-in-suit, at
3 particular times. So, what the court will be asked to
4 decide is what those regulations mean legally. That is
5 not a question to be submitted to the jury. The
6 regulations say what they say; and to what extent they
7 impose legal obligations is for the court, not for the
8 jury. This is just like interpreting a statute, for
9 example.

10 On the flip side of that is Apple's obligation
11 as a member of ETSI, which is also specifically
12 determined with reference to the ETSI regulations. So,
13 the court will be asked, as a matter of law, to determine
14 the nature and extent of Apple's obligation as a member
15 of ETSI who seeks to take advantage of the FRAND benefit
16 that comes with that membership.

17 So, these obligations are based on the ETSI
18 written documents that have been in place for many years
19 and the interpretation of those written documents. Those
20 are not factual issues. Those are not disputed issues.
21 Those are issues of law.

22 THE COURT: All right. Let me have
23 Mr. Mueller respond to that.

24 MR. MUELLER: Sure. There may be some room
25 for agreement on these issues if what I heard as the

1 legal issues that would be presented to your Honor -- if
2 I understand that correctly.

3 Now, I'm not sure this would require a bench
4 trial; and, in fact, I don't think it does. But if we're
5 talking about some pure questions of law, these, in fact,
6 may be some of the things that we had in our briefing in
7 different parts -- I know there's a lot of briefing that
8 went in to your Honor -- in the letter briefing on
9 requests for summary judgment. And we might be able to
10 pull out of that certain issues that seem to be at the
11 crux of what they are seeking and have, you know, some
12 form of summary judgment hearing essentially on the legal
13 questions, on the legal questions alone.

14 That may be something that we can all agree to
15 and have your Honor conduct it and, you know, rule on
16 that before the January trial. So, let me see if I can
17 take my best crack at distilling what was said.

18 I think there were two arguments made as to
19 the implications of Core Wireless' contract claims for
20 the jury trial; and they were, first, that if they are
21 right about the ETSI obligations, that could somehow
22 result in them being released from their FRAND
23 commitments for damages purposes and that the jury would
24 no longer need to be instructed on the FRAND
25 obligations.

1 We think as a matter of law, that's just
2 clearly wrong. No case has ever said that. I'm not
3 aware of a shred of authority to support that; and we
4 would be very happy to have your Honor decide that legal
5 question before the jury trial, whether the ETSI
6 obligations could somehow be discharged in the way that
7 they are suggesting. That is a legal question, we agree,
8 and certainly one we would be happy and pleased to brief
9 to your Honor.

10 The second was injunctions, the notion that
11 somehow their contract claims could result in their being
12 able to seek an injunction. We think as a matter of law,
13 there is absolutely no way, as a nonpracticing entity
14 asserting FRAND-committed patents that didn't even
15 request an injunction in their pleadings, they should be
16 allowed to seek an injunction. And, again, we would be
17 happy to deal with that on the briefs to your Honor as a
18 matter of law.

19 So, those are two concrete legal issues --
20 whether they could be discharged from their FRAND
21 commitment for purposes of damages and whether they could
22 conceivably seek an injunction -- that we would be, as I
23 said, pleased to brief to your Honor and have your Honor
24 decide as a matter of law before the jury trial.

25 The other issue that was mentioned was

1 unenforceability as a consequence of our contract claims.
2 I think actually it's a consequence of some of our
3 equitable defenses that we've pleaded. And we agree
4 those are issues for your Honor. I don't think, however,
5 they could be dealt with before the jury trial because
6 they deal with the patents being untimely disclosed to
7 standard-setting organizations; and there is just factual
8 evidence that would need to come in as part of the
9 technical testimony.

10 For example, there's going to need to be
11 testimony on working groups at ETSI that considered
12 various proposals and the chronology by which they did
13 so. Those are very much factual questions that
14 your Honor would need to have a record on before
15 rendering a judgment on unenforceability. Also note
16 those are our defenses, and we're not asking your Honor
17 to decide those now.

18 I think with respect to the claims they've
19 presented, the two arguments I heard as to how those
20 claims could impact the jury trial are, first, releasing
21 them from their FRAND commitment and, second, this
22 possibility of seeking an injunction. And we think as a
23 matter of law, both of those positions are incorrect and
24 positions that your Honor could resolve prior to the jury
25 trial.

1 So, if those are the issues on the table, we
2 agree; but I think the appropriate vehicle would be some
3 form of dispositive motion briefing as opposed to a bench
4 trial.

5 THE COURT: Okay. Mr. Bunsow, response?

6 MR. BUNSOW: Well, it sounds like we've got
7 partial agreement; and that's a step in the right
8 direction. As to the Apple defense of unenforceability,
9 it is based entirely on supposed late disclosure. There
10 is no dispute as to when disclosures were made. As we
11 pointed out in our memorandum to the court, this is not a
12 new theory by Apple. They have tried it in two other
13 cases, and They have lost it in both of those other
14 cases.

15 So, I think my concern expressed earlier that
16 we should not go through a full-blown jury trial when we
17 have a legal issue of enforceability, yea or nay, that
18 could be decided by the court, only to give Apple another
19 bite after the jury trial on whether or not they're
20 liable.

21 So, all three of those issues should be
22 decided before the trial, including Apple's, as
23 Mr. Mueller conceded, equitable defense. It's an
24 equitable defense. Equitable defenses are tried to the
25 court. That's *Hornbook* law.

1 So, I think if --

2 THE COURT: Well, Mr. Bunsow, to the point,
3 though, that Mr. Mueller has raised several times -- and
4 I think the typical practice from the court, of course,
5 would be, as to unenforceability, that that be developed
6 during the course of the trial, that record.

7 Now, that testimony that is not appropriately
8 submitted in front of the jury, that could be heard on a
9 post-trial basis as a supplement to the record developed
10 at the jury trial with this being outside the presence of
11 the jury; and then the court can make determinations
12 based upon that. I think that's typically appropriate.

13 So, I think that to the extent we're talking
14 about developing things that would typically be done in a
15 jury record, I think that's their point. So, I guess,
16 you know, if we're starting to go in those areas, then --

17 MR. BUNSOW: I understand their --

18 THE COURT: -- perhaps that would not be the
19 best route to go.

20 MR. BUNSOW: I understand their point and I
21 understand your point and I've been there, done that.
22 And typically this arises with an inequitable conduct
23 defense, and inequitable conduct defenses are very
24 factually intensive. And that record is developed
25 during the course of the trial in terms of who said what

1 to the Patent Office and when and all those sorts of
2 things.

3 But this is different. This is an accusation
4 by Apple that a disclosure that was not made by a
5 particular time renders the patent unenforceable. This
6 is a pure legal issue, again, based on the ETSI
7 regulations just like our claims are based on the ETSI
8 regulations, in fact, maybe even more so because they
9 deal directly with disclosure obligations which are
10 clearly set forth in the ETSI obligations.

11 So, it's really a very narrow legal issue.
12 It's not the type of factual issue that comes up in an
13 inequitable conduct defense where evidence will be taken
14 outside the jury during the course of the trial. It's
15 really much different than that, and I think you have to
16 look at the evidence that -- the supposed evidence that
17 will be presented.

18 So, what is Apple going to present to the jury
19 in terms of its unenforceability defense? Well, they're
20 going to present copies of the ETSI rules. Now, that's
21 not something for the jury to interpret. They're going
22 to present presumably Mr. Palmer to say, "I'm an expert
23 in French law, and these rules mean thus-and-so." That's
24 not a determination for the jury.

25 Those are determinations for the court, and

1 all of these ETSI obligations should be determined in the
2 same package because the court is going to have to dig
3 into those ETSI rules to determine any of them anyway.
4 They're all legal issues. They should all be determined
5 at the same time in advance of the trial. It's very
6 different than the inequitable conduct enforceability
7 type of defense.

8 MR. MUELLER: Just a couple of words, your
9 Honor?

10 THE COURT: Okay. Yes.

11 MR. MUELLER: Just briefly, your Honor, a
12 couple of points. The unenforceability record on these
13 untimely disclosure issues would be something that would
14 need to be factually developed as part of the full trial.
15 That said, there could be some piece that would be heard
16 outside the jury's earshot but it certainly can be done
17 as part of a jury proceeding and I've actually tried
18 these types of questions before to juries and there was
19 no procedural impediment to doing so.

20 But I definitely take Mr. Bunsow's point that
21 there could be some piece of that that your Honor should
22 hear separate from the jury; and we think that's true for
23 other claims in the case as well, that the first jury
24 trial -- the jury trial in chief, so to speak --
25 shouldn't have all of the issues be part of it.

1 I mentioned this earlier, your Honor. But the
2 contract claims, even if those were to ultimately be
3 decided by the jury, those raise evidentiary questions
4 that the jury in deciding the first merits case shouldn't
5 hear. And if I could be more concrete, they are claiming
6 that the course of correspondence between the parties and
7 offers made and received -- some of which were made
8 pursuant to mediation, some of which were made pursuant
9 to Rule 408 -- should come in and be heard by the jury.

10 Now, to the extent Apple were to make an
11 offer, that could color the jury's view of the merits and
12 be highly prejudicial to their consideration of the core
13 liability issues. We don't think that's appropriate. We
14 think the jury should decide the patent merits based on
15 the patent merits and not be tainted by evidence that
16 they shouldn't hear.

17 So, I do think that there is going to need to
18 be some staging of the proceedings; and perhaps as part
19 of that, we could have any unenforceability evidence that
20 only your Honor should hear received by your Honor after
21 the jury has heard the merits case and decided the merits
22 issues.

23 I don't think this would result in anything
24 cumbersome or hard to pull off. We're talking about an
25 extra day or two tacked onto the end of the jury trial

1 where either they would be held over after they rendered
2 their initial verdict for one more day's worth of
3 testimony and/or your Honor would hear some additional
4 testimony bearing on the bench issues. But that would
5 set up a process whereby we would first get a full record
6 and a decision on the threshold issues, which could end
7 the whole thing. It could all be over at that point.
8 But if it's not, the residual jury issues, including
9 those that relate to evidence that really shouldn't be
10 heard as part of the first trial, or the residual bench
11 issues, could be efficiently and quickly taken up at the
12 end; and we think that's the best way to do it.

13 THE COURT: Okay. Thank you.

14 Anything else?

15 MR. BUNSOW: I just want to make a practical
16 point, your Honor. What Apple is proposing is decide all
17 of Core's issues that may impact Apple -- whether they're
18 entitled to FRAND, what their relief might be, whether
19 they've breached their obligation -- in advance of the
20 jury trial. We're in favor of that.

21 But Step 2 is let's put all of Apple's
22 defenses in with the patent merits. Let's mix it all up
23 in with the patent merits so that the jury not only has
24 to consider a very technical patent case but now has to
25 consider ETSI regulations, timing of disclosures.

1 Mr. Mueller alluded to meetings and technical discussions
2 and all of those sorts of things. That has the risk of
3 overwhelming a jury determination on the merits. We're
4 all in favor of a jury determination on the merits. It's
5 impractical.

6 The third problem is until Apple's equitable
7 defense of unenforceability is determined, there is
8 likely no chance of resolving this case. That is
9 something that they have been pushing. They've pushed it
10 in two other cases, unsuccessfully in those two other
11 cases. It was held against them in those two other
12 cases.

13 They're trying to make a law that they can
14 latch onto in terms of ETSI disclosures for this case and
15 for other cases. Fair enough. You know, I'd be doing
16 the same thing. But the fact of the matter is the ETSI
17 rules are subject to legal interpretation. There are no
18 factual disputes about the disclosures. They occurred
19 when they occurred. They're matters of record. They're
20 matters of ETSI record. There is no dispute about that.
21 So, that needs to be determined as well.

22 There is no way that the jury should decide
23 those, and it makes no sense to burden the jury record
24 with it. It will just muck up the jury case, for lack of
25 a better phrase. Thank you.

1 THE COURT: All right. Thank you.

2 MR. MUELLER: May I be heard?

3 Respectfully, your Honor, we agree the first
4 jury trial should be kept as simple as possible. And to
5 the extent that there's pieces of the unenforceability
6 case that could be sequenced after they render their
7 verdict on the core merits, we're in favor of that, your
8 Honor. We very much want to have an understandable
9 patent merits case decided first.

10 THE COURT: Well, let me say this. You know,
11 I am in no way trying to take anything away from a jury.
12 I think, you know, juries and this jury that will be
13 impaneled in this trial will do an excellent job. They
14 are going to try their best. They are perfectly -- they
15 handle complex cases around this country every day. They
16 are perfectly capable of doing it.

17 I'm also not intending and not desiring to
18 take anything away from a jury that should be decided by
19 a jury. That's fine. That is the way our system works
20 and the way it's going to work here in this case.

21 All I'm just exploring are the possibility of
22 somewhat streamlining things for counsel, the parties,
23 and the jury; looking at the possibility, if there are
24 legal issues, of perhaps handling those in a pretrial
25 manner or also exploring post-trial manner to, as I say,

1 help streamline that trial; also perhaps help the parties
2 resolve the matter without the expense perhaps of a
3 full-blown jury trial which, again, if that's what the
4 parties want, that's perfectly fine and we'll try it and
5 you'll have your answer.

6 So, that's all I'm trying to do. I'm
7 perfectly confident in a jury. They can handle it. They
8 handle complex civil and criminal cases all over the
9 country every day, and they'll do it absolutely fine
10 here.

11 I'm also not trying to take any jury issue
12 away at all. We're going to try this case to a jury.
13 That's fine. The two goals are perhaps helping resolve
14 things one way or the other and getting some answers,
15 some structure to what the jury is being asked to do
16 without perhaps, you know, putting things in that they
17 just -- it's not for them to decide. Not that they
18 couldn't decide it; it's just not for them and would help
19 them and help the counsel to structure their cases more
20 clearly for the jury.

21 All right. I'm going to take about a five- or
22 ten-minute recess and then we'll come back and I may have
23 some orders for you to comply with. We'll be in recess
24 about ten minutes.

25 (Recess, 10:15 a.m. to 10:34 a.m.)

1 (Open court, all parties present.)

2 THE COURT: All right. What I'm going to do
3 is -- in the discussion this morning there appears to be,
4 I believe, some agreement here that there are certain
5 perhaps, I'll say, "narrow" issues that the court can --
6 perhaps needs to resolve, it appears, you know,
7 characterized as "legal issues."

8 What I'm going to order the parties to do
9 is -- based on what we've talked about today is to meet
10 and confer and by August 15th submit to the court issues
11 the parties can agree to -- agree that are legal issues.
12 Set those out for me. Here's the issue for the court.
13 Okay? That's one. I want you to submit that by
14 August 15th.

15 Number 2, I want you to submit to me basically
16 your findings, your conclusions the court needs to make
17 on that issue, obviously characterized as you believe the
18 court should resolve it, proposed findings and
19 conclusions. So, here's the issue. Here's Core's
20 findings and conclusions how it should come out, and
21 here's Apple's. Here is the next one. Set those out for
22 me.

23 What I would also like you to do is, on the
24 same date -- now, the extent of this -- there may be some
25 flexibility on this; but what I want is with those issues

1 submitted, with the proposed findings and conclusions
2 submitted, that each party submit to me their jury
3 instructions and the verdict form that is related to
4 those issues.

5 Now, that may not have to be at this point. I
6 believe the jury instruction deadline is October 31st.
7 It may not have to be -- it's not your full jury
8 instructions. It's not -- perhaps doesn't have to be
9 your full RAND instructions, but how it would look if --
10 say the court resolves the legal questions in Core's
11 favor; and, so, then Core will propose these jury
12 instructions.

13 Now, I know if the court resolved it against
14 you, it might be different; but I just want to see what
15 each side's proposed instructions are based on an
16 affirmative -- a favorable finding on this particular
17 legal issue.

18 Now, if you can, I would like to see your full
19 RAND instructions and verdict form. Now, August 15th
20 may be -- I'll give you some more time on that, but I'd
21 like to go ahead and see this as soon as possible.

22 I think what I will do is this. I'll give you
23 the option to give me those jury instructions and verdict
24 form by August 15th that pertain to these legal issues.
25 If that's more limited than full RAND instructions,

1 that's fine. But I'd like the full FRAND instructions by
2 the end of this month, by August 31st. I think that
3 would help me go ahead and start looking at it and get
4 my mind oriented on where the parties are going with
5 this.

6 Now, I know this is somewhat kind of up in the
7 air; and I'm not locking anybody into anything. But I
8 think for y'all to sit down and identify some legal
9 issues you can agree to, tell me what each party's
10 position on those are, and also go ahead and sit down and
11 see where you can agree on FRAND issues and where you
12 can -- y'all sit down and look at that and let me look at
13 it, I think would be helpful.

14 Now, I think we've narrowed -- I brought y'all
15 here today to discuss this FRAND obligation, FRAND
16 issues. I think we've narrowed it substantially to maybe
17 some legal issues that the court may be able to resolve
18 and might help the parties. But I think we're sort of at
19 an early stage here, and I just want to get those
20 identified after you talk. I want to get your positions
21 on those particular issues, and then I want to get your
22 jury instructions based on where you think the court
23 should go on those legal issues.

24 All right. Any questions from the plaintiff?

25 MR. BUNSOW: I believe that at least as we sit

1 here today, we have a situation where Core is amenable to
2 having some of those issues determined that Apple wants
3 determined. Apple is not amenable to having ETSI issues
4 determined that Core wants to have determined. It puts
5 us in a bit of a situation.

6 THE COURT: Well -- and here's what I'm
7 saying. I want the parties to see if they can agree on
8 something. If you can't agree on it, then, you know,
9 we'll deal with it down the road. But I'm talking about
10 things you can agree on.

11 Now, there's going to come a point, if there
12 are legal issues, the court is going to have to resolve
13 them some way.

14 MR. BUNSOW: Right.

15 THE COURT: And that's going to be pretrial or
16 post trial, somewhere along the way. I want to just, you
17 know -- I don't know how this will turn out. I don't
18 know what the court's next step will be. I will say that
19 I am wanting to resolve these so-called "legal issues" on
20 a matter where I give the parties -- I want live
21 testimony on these. I want to see the experts. I want
22 to give you an opportunity to present to me -- if there
23 is a fact witness that's got some bearing on this issue,
24 I want to hear from them.

25 So, I don't know what the next step will be;

1 but I want y'all to try to agree -- and, Mr. Bunsow, if
2 you feel that's the way this is going and you don't want
3 to agree -- but I will say it may be beneficial for each
4 side to sit down and, no matter when you think it needs
5 to be resolved, if it's a legal issue, identify it.

6 MR. BUNSOW: Right.

7 THE COURT: And, you know, if you think
8 it's -- you just tell me, "Legal issue: Core says
9 pretrial; Apple says post trial."

10 MR. BUNSOW: Right.

11 THE COURT: Just give me that and then give me
12 what your -- "and the court should resolve this this way
13 because one, two, three."

14 MR. BUNSOW: Right.

15 THE COURT: Apple says, "No. You should
16 resolve it this way because one, two, three. This
17 evidence shows this. This evidence shows this. This
18 evidence shows this."

19 MR. BUNSOW: Right.

20 THE COURT: And then I'll look and see how to
21 approach it from there.

22 MR. BUNSOW: That's fair. We're happy to
23 engage in the process, and we just want to make sure it's
24 a two-way street.

25 THE COURT: Okay. All right.

1 Mr. Mueller?

2 MR. MUELLER: Just briefly, your Honor.

3 I think we're going to be able to reach some
4 common ground on these issues. You know, we're certainly
5 going to do our best to find issues that we can bring
6 before your Honor to resolve. And I think I've heard
7 today some candidates, and we'll continue to mull over
8 some others as well.

9 Just a couple quick logistical questions if I
10 could, your Honor. On the 13th -- I'm sorry -- the 15th,
11 the date the 15th, those submissions, as I understand it,
12 would be limited to those areas where we decide jointly
13 that your Honor should decide certain questions and, on
14 those issues we agree on, put in proposed findings of
15 fact and conclusions of law and perhaps our suggestions
16 on our process for adjudicating them. But we would not
17 also be including issues that we have not reached
18 agreement on; is that right?

19 THE COURT: Yes. My intention had been for
20 y'all to agree on issues. Now, you know, I mean, at the
21 risk of expanding this, you know, it may be that if one
22 side says, "Well, here's a legal issue that should be
23 resolved by the court" and the other side says "No," it
24 may be good for me to see that, too.

25 You know, I think that the way -- I think what

1 we'll do is we'll limit this to issues the parties can
2 agree on at this point. Now, again, I think, you know,
3 if there are other issues that the parties have
4 disagreement on, then the court is going to have to
5 resolve that at some point. I think most likely that
6 will be done as a matter of what will be submitted to the
7 jury, a matter of jury instructions and jury questions;
8 and then that may have to be resolved on a post-trial
9 basis if the court decides it's a legal issue.
10 Conversely, if we get down to it at pretrial and there is
11 an issue the parties can't agree on, the court may have
12 to make a determination on it pretrial.

13 But I think -- the focus of what I'm trying to
14 get at here is what y'all have talked about today. There
15 seemed to be some agreement, and I want y'all to try to
16 agree and submit those -- as I say, identify those if
17 it's pretrial or post trial. Let me know the parties'
18 positions on that, but just that statement and then how
19 the parties think it should come out.

20 MR. MUELLER: Fair enough.

21 And in that submission on the 15th, would it
22 be appropriate if we did it in sort of letter briefing
23 format to your Honor?

24 THE COURT: No, do it as a filing. I want it,
25 you know, a joint submission pursuant to the court's

1 order of August 1st. And then, as I say, just identify
2 agreed legal issues. Tell me what stage each party
3 thinks or, if there is agreement, when it should be
4 resolved and then just a brief, "Here is the way the
5 court should come out on it, and here is why."

6 And I want it, you know, really pared down.
7 This is just a notice to the court. It's not your
8 evidentiary briefing and not your evidentiary submission.
9 But I just want to get a brief sort of proposed, "Here is
10 the way the court should find, and here is briefly why."

11 MR. MUELLER: Understood.

12 Last question, your Honor. So, for the end of
13 the month, I understand, your Honor, that we should be
14 submitting FRAND jury instructions and verdict form. And
15 just so we're clear, as we envision the jury instructions
16 that would be given at the merits trial, those would bear
17 on damages. There's a separate and, I think, more
18 complicated question about what to do with these contract
19 claims. You know, for reasons that we've explained in
20 prior briefing -- I won't belabor them today -- we don't
21 think there is any, you know, legal theory that supports
22 some of what they're pleading.

23 But in any event, it's a much more complicated
24 set of issues. There is the evidentiary questions we
25 talked about, including the mediation and 408 issues. I

1 would respectfully suggest, your Honor, that we limit the
2 31st to the jury instructions that would be appropriate
3 in the patent merits and damages trial; and then we could
4 take up, perhaps in the October 3rd submission, any other
5 issues.

6 THE COURT: I think that's fine. I mean, I'm
7 just wanting to, you know, get sort of a general feel and
8 flavor for how each party is presenting this, where the
9 disputes are. It doesn't have to be comprehensive. You
10 know, there are probably some issues the court is going
11 to have to resolve down the road.

12 But I want on the 15th jury instructions that
13 pertain to what we're talking about, these legal issues;
14 and then the 31st is a more broad damages submission.
15 Again, I'm not locking anybody in. I just want to see
16 where the parties are going on this.

17 MR. MUELLER: Understood. Thank you, your
18 Honor.

19 THE COURT: All right.

20 MR. BUNSOW: May I just make one point, your
21 Honor?

22 When you first described the 15th and the
23 31st, what I thought you were doing was saying let's use
24 the submission on the 31st to see what the jury trial
25 would look like if these issues are included in the jury

1 trial. And I think that's a useful exercise because I
2 think it would be very enlightening to see what these
3 issues look like if they are going to be presented to the
4 jury.

5 What I just heard Mr. Mueller suggest is that
6 the filing on the 31st would not include those issues,
7 and I don't think that's a useful exercise. Why would we
8 submit merits-based damage instructions? I mean, you can
9 look at the form book and get those.

10 What I want to see is what Apple's
11 instructions look like when they're saying that the
12 patents are unenforceable, what ours look like when we
13 say that Apple is not entitled to a FRAND rate anymore.
14 I think those would help the court.

15 MR. MUELLER: If I could, your Honor, I think
16 what I understood was on the 15th we'd spell out here's
17 the issue. Here's why we think we're right. Here's why
18 they think they're right, and then here's the implication
19 of that issue in terms of the structure of the
20 proceedings to follow.

21 That may take the form of jury instructions.
22 For unenforceability I don't think there would
23 necessarily be a jury instruction, but we could still
24 spell out here is the implication of it. And I think
25 that would be a useful exercise. You know, we would say

1 here is the issue, here is our position, and here is the
2 affect if we're right, if they're right.

3 THE COURT: Well, look, all I'm saying is I
4 just want -- on the 15th if you can agree to some legal
5 issues, I want you to identify those; and then I want the
6 jury instructions, how they would look based upon the
7 court's determination, say in Core's favor on those
8 issues or in Apple's favor, what would it look like. On
9 the 31st I'm broadening that out to more of just a
10 generalized here's how it would -- each side is going to
11 propose jury instructions look.

12 I'll leave it to y'all on, you know, the
13 specifics of that. I'm not trying to get down to that
14 level of detail at this point. But I do think the more,
15 the better for the court to understand and for the
16 parties to understand. I think everybody knows what each
17 party's position is. It's just a matter of articulating
18 that in a jury instruction.

19 So, yes, I mean, I want those submitted to
20 the -- I mean, if Apple's position is these need to be
21 developed in a jury trial record, you submit those
22 instructions the way you're going to propose them, the
23 way they're going to look. So, don't hold back. The
24 31st is the full breadth.

25 Now, if there is some reason why you don't

1 want to submit something, you know, we'll take that up;
2 but --

3 MR. MUELLER: Yeah. And that makes perfect
4 sense, your Honor. The only point I was making is on the
5 31st, as I understand your Honor, that would be the jury
6 instructions -- the full set of FRAND-related jury
7 instructions for this merits trial; and I think there
8 still are substantial questions that are going to take
9 longer than that to figure out about any follow-on
10 proceedings on contract claims and the rest. That's all
11 I'm saying.

12 THE COURT: If that's Apple's position -- I'm
13 just talking about if Apple's position is we should be
14 resolving some things in a staged proceeding, then, you
15 know -- well, Mr. Mueller, actually, you know, I really
16 don't -- I think just submit everything on these damages
17 issues. Just submit it all. Okay?

18 MR. MUELLER: Thank you, your Honor.

19 THE COURT: All right. I mean, if you think
20 it's a staged proceeding, submit both stages. I want to
21 see it all.

22 MR. MUELLER: Great.

23 THE COURT: All right. Anything else?

24 MR. MUELLER: No, your Honor.

25 THE COURT: Anything else from the plaintiff?


MR. BUNSOW: Thank you, your Honor.

THE COURT: All right. Thank you, and we're
adjourned.

(Proceedings concluded, 10:50 a.m.)

COURT REPORTER'S CERTIFICATION

I, court approved transcriber, hereby certify
on this date, August 11, 2014, that the foregoing is a
correct transcript from the official electronic sound
recording of the proceedings in the above-entitled
matter.


CHRISTINA L. BICKHAM, CRR, RMR